

## A Presumption of Disclosure: Towards Greater Transparency in Asylum Proceedings

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### I. INTRODUCTION

When rebels from neighboring countries crossed the border and fomented rebellion, the government in Nafissatou's country responded with a brutal crackdown.<sup>1</sup> Nafissatou and her husband, devout Muslims, decried the violence on both sides.<sup>2</sup> After destroying their home, soldiers took Nafissatou and her husband into custody.<sup>3</sup> In jail, soldiers repeatedly beat both of them and gang raped Nafissatou.<sup>4</sup> After her husband died of his wounds, a neighbor came to Nafissatou's aid and helped her escape.<sup>5</sup> Eventually, Nafissatou arrived in the United States and applied for asylum.<sup>6</sup>

Fauziya, a seventeen-year-old girl and the youngest daughter of a privileged family, attended a boarding school.<sup>7</sup> Her father advocated ed-

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1. The precise story that Nafissatou Diallo related on her asylum application and in her interview is unclear. It has been compiled here from the following sources, hereinafter referred to as the Diallo Sources: BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: GUINEA (2003), available at <http://www.state.gov/j/drl/rls/hrrpt/2003/27731.htm>; Sam Dolnick, *Immigrants May Be Fed False Stories to Bolster Asylum Pleas*, N.Y. TIMES (July 11, 2011), [http://www.nytimes.com/2011/07/12/nyregion/immigrants-may-be-fed-false-stories-to-bolster-asylum-pleas.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/07/12/nyregion/immigrants-may-be-fed-false-stories-to-bolster-asylum-pleas.html?pagewanted=all&_r=0); Jim Dwyer, *With False Tale About Gang Rape, Strauss-Kahn Case Crumbles*, N.Y. TIMES (Aug. 23, 2011), [http://www.nytimes.com/2011/08/24/nyregion/housekeepers-false-tale-undid-strauss-kahn-case.html?\\_r=0](http://www.nytimes.com/2011/08/24/nyregion/housekeepers-false-tale-undid-strauss-kahn-case.html?_r=0); Jim Dwyer & Michael Wilson, *Strauss-Kahn Accuser's Call Alarmed Prosecutors*, N.Y. TIMES (July 1, 2011), <http://www.nytimes.com/2011/07/02/nyregion/one-revelation-after-another-undercut-strauss-kahn-accusers-credibility.html?pagewanted=all>; Matt Williams, *Dominique Strauss-Kahn Settles Sexual Assault Case with Hotel Maid*, THE GUARDIAN (Dec. 10, 2012), <http://www.theguardian.com/world/2012/dec/10/dominique-strauss-kahn-case-settled>.

2. See Diallo Sources, *supra* note 1.

3. See *id.*

4. See *id.*

5. See *id.*

6. See *id.*

7. *In re Kasinga*, 21 I. & N. Dec. 357, 358–59 (B.I.A. 1996); Karen Musalo, *In Re: Fauziya Kasinga: Brief for the Respondent*, 7 S. CAL. REV. L. & WOMEN'S STUDIES 373, 378 (1998).

education for girls and opposed both polygamous marriages and female genital mutilation (FGM).<sup>8</sup> When Fauziya's father died, however, his property and family reverted to the control of paternal relatives.<sup>9</sup> Fauziya's paternal aunt halted her education, contracted for her to enter a polygamous marriage with a man thirty years her senior, and made arrangements for her "circumcision".<sup>10</sup> Fauziya's sister and her aunt came to her aid: they pooled their money, took Fauziya to the nearest airport, and put her on the first international flight.<sup>11</sup> With help from kindly strangers, Fauziya eventually arrived in the United States and applied for asylum.<sup>12</sup>

Every day, Asylum Officers (AOs) and Immigration Judges (IJs) hear cases like these. Their task is to determine if the asylum seeker has a genuine claim to protection under the Refugee Act, which prohibits returning a refugee to a country where her life or freedom is threatened due to race, religion, political opinion, nationality, or membership in a particular social group.<sup>13</sup> AOs and IJs are aware that their decision may mean life or death for an asylum seeker.<sup>14</sup> They are also aware that false claims are "distressingly common,"<sup>15</sup> that unscrupulous attorneys and unauthorized practitioners of immigration law have perpetrated fraudulent asylum schemes,<sup>16</sup> and that granting asylum where it is not merited encourages asylum fraud and weakens the immigration system.<sup>17</sup>

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8. Musalo, *supra* note 7, at 378.

9. *Id.*

10. *Id.* at 379–80.

11. *Id.* at 380–81.

12. *Id.* at 381–82.

13. 8 U.S.C. § 1158(b)(1)(B)(i) (2009).

14. ASYLUM OFFICER BASIC TRAINING COURSE, U.S. CITIZENSHIP & IMMIGRATION SERVS., INTERVIEWING PART I: OVERVIEW OF NONADVERSARIAL ASYLUM INTERVIEW 5 (2006) [hereinafter AOBTC INTERVIEWING PART I], available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Interview%20Part-Overview-Nonadversarial-Asylum-Interview-31aug10.pdf> ("An applicant wrongly found ineligible for asylum status may . . . eventually . . . face persecution or death.").

15. *Angov v. Holder*, 736 F.3d 1263, 1270 (9th Cir. 2013). See also GOV'T ACCOUNTABILITY OFFICE, GAO-08-9353, U.S. ASYLUM SYSTEM: AGENCIES HAVE TAKEN ACTIONS TO HELP ENSURE QUALITY IN THE ASYLUM ADJUDICATION PROCESS, BUT CHALLENGES REMAIN (2008) [hereinafter GAO ASYLUM REPORT] (detailing concerns of AOs and IJs regarding making accurate decisions on asylum claims).

16. See, e.g., *Pavlov v. Holder*, 697 F.3d 616, 618 (7th Cir. 2012) (detailing evidence of a false application racket); *Dhariwal v. Mayorkas*, CV 11-2593 PSG, 2011 WL 6779314, at \*1 (N.D. Cal. Dec. 27, 2011) (describing evidence that law firm had submitted over one thousand fraudulent asylum applications).

17. Monica Schurtman & Monique C. Lillard, *Remedial and Preventive Responses to the Unauthorized Practice of Immigration Law*, 20 TEX. HISP. J.L. & POL'Y 47, 60 (2014) (describing the systemic as well as personal harm resulting from immigration fraud).

The American immigration system poses challenges to both the asylum seeker and the decisionmakers. Immigration law has been described as a “labyrinth,” similar in complexity to the Internal Revenue Code.<sup>18</sup> Asylum seekers are often unrepresented, unfamiliar with the law, and nonfluent in English.<sup>19</sup> Yet, even immigrants who are represented by counsel may still be at a disadvantage; according to one study, the level of representation in immigration is the worst of any civil field.<sup>20</sup> In addition, asylum claims depend heavily—sometimes entirely—on the credibility of the applicant. Due to the difficulty in obtaining documentary and testimonial evidence regarding conditions of persecution, the asylum seeker’s own testimony is often the only evidence.<sup>21</sup> The consistency, detail, and specificity with which an asylum seeker relates her story—particularly the most traumatic events—is of prime importance to the determination of whether or not asylum is granted.<sup>22</sup>

AOs and IJs work within an overburdened system. IJs are under enormous pressure to hear claims quickly; in 2006, IJs were expected to hear 1,400 cases per year, or nearly twenty-seven per week.<sup>23</sup> In some immigration courts, those already high numbers have skyrocketed. A 2014 Washington Post investigation revealed that an IJ in Arlington had twenty-six cases scheduled in one morning, resulting in an average of seven minutes per case.<sup>24</sup> In addition, a 2008 study by the Government

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18. *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000) (citing *Castro-O’Ryan v. U.S. Dep’t of Immigration and Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987)).

19. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK, at G1 (2013) [hereinafter EOIR 2012 YEAR BOOK], available at <http://www.justice.gov/eoir/statspub/fy12syb.pdf> (reporting that 56% of respondents were represented in removal cases in FY 2012).

20. Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 331 (2011) (reporting that fifty-seven percent of federal appellate judges find immigration the field of law in which they perceive the most significant disparities in legal representation). An indicator of the extent of the problem is the online list of immigration practitioners currently under discipline for professional misconduct. Exec. Office for Immigration Review, *List of Currently Disciplined Practitioners*, U.S. DEP’T OF JUSTICE (Mar. 18, 2015), <http://www.justice.gov/eoir/discipline.htm>.

21. See, e.g., 8 U.S.C. § 1158(b)(1)(B)(ii) (2013) (stating that the applicant’s testimony alone may be sufficient to establish eligibility for asylum); *Abankwah v. INS*, 185 F.3d 18, 26 (2d Cir. 1999) (“[I]t must be acknowledged that a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation.”).

22. See 8 U.S.C. § 1158(b)(1)(B)(iii) (2009). See also *Shrestha v. Holder*, 590 F.3d 1034, 1041 (9th Cir. 2010) (explaining the standards for credibility determinations).

23. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 383 (2007) (quoting Second Circuit Chief Judge John M. Walker. Walker continued, “I fail to see how Immigration Judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances.”).

24. Eli Saslow, *In a Crowded Immigration Court, Seven Minutes to Decide a Family’s Future*, WASH. POST (Feb. 2, 2014), <http://www.washingtonpost.com/national/in-a-crowded-immigration->

Accountability Office found that 82% of IJs and 65% of AOs believe they have insufficient time to thoroughly adjudicate cases.<sup>25</sup> The pressure to hear ever more cases also leads to a lack of training and professional development: a majority of AOs and IJs cited a need for increased ongoing training, especially in assessing credibility and detecting fraud.<sup>26</sup> Significant inconsistencies in the grant rates between and within asylum offices and immigration courts are a further indication of the burdens on the system.<sup>27</sup> In the cases of Nafissatou and Fauziya, one woman was telling the truth, and one woman was lying.<sup>28</sup> The fraudulent claim succeeded while the genuine claim was denied.<sup>29</sup>

The cry for immigration reform is growing stronger. Many proposals advocate substantive reforms to asylum law, including broadening asylum protections and streamlining asylum procedures,<sup>30</sup> granting rights of discovery in immigration court,<sup>31</sup> and establishing an inquisitorial, rather than an adversarial, system for asylum proceedings.<sup>32</sup> Substantive reforms, however, require congressional action and are mired in political debate.<sup>33</sup> This Note proposes a procedural reform to the affirmative asylum process: the direct and proactive disclosure of routine documents in the applicant's file, bypassing the need for a Freedom of Information Act (FOIA) request.<sup>34</sup> This reform is politically feasible because it is within

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court-seven-minutes-to-decide-a-family's-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3\_story.html?hpId=z4.

25. GAO ASYLUM REPORT, *supra* note 15, at 58, 70.

26. *Id.* at 5, 22.

27. Rachel D. Settlage, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. INT'L L.J. 61, 79–81 (2009) (discussing inconsistent grant rates among and between asylum offices and recommending increased training and decreased workload for AOs). *See also* Ramji-Nogales et al., *supra* note 23, at 378 (analyzing the inconsistency in grant rates and concluding that “[w]hether an asylum applicant is able to live safely in the United States or is deported to a country in which he claims to fear persecution is very seriously influenced by a spin of the wheel of chance; that is, by a clerk’s random assignment of an applicant’s case to one asylum officer rather than another, or one immigration judge rather than another.”).

28. *In re Kasinga*, 21 I. & N. Dec. 357, 364 (B.I.A. 1996); Dwyer, *supra* note 1.

29. *In re Kasinga*, 21 I. & N. Dec. at 364; Dwyer, *supra* note 1.

30. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

31. *See* Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569, 1569 (2014).

32. *See* Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647, 647 (2012).

33. *See, e.g.,* Ashley Parker & Jonathan Weisman, *After Deriding G.O.P. on Immigration Bill, Boehner Shifts His Aim to Obama*, N.Y. TIMES (Apr. 29, 2014), <http://www.nytimes.com/2014/04/30/us/politics/immigration-bill-hinges-on-new-obama-attitude-boehner-says.html>.

34. For a discussion of the challenges of using FOIA to obtain immigration records, see Larry R. Fleurant, *Immigration Law: Nowhere to Turn—Illegal Aliens Cannot Use the Freedom of In-*

agency discretion and requires no legislative action.<sup>35</sup> While proactive disclosure in affirmative asylum adjudications is not a substitute for comprehensive immigration reform, it is a pragmatic step that would improve efficiency, lower administrative costs, increase confidence in the immigration system, and lead to fairer and more accurate determinations of credibility.

Part II begins with an overview of asylum law, including its history, the extent of the refugee population, eligibility requirements, and the application process. Part III describes the procedure for those asylum seekers whose claims are referred to immigration courts, while Part IV describes the inefficient and burdensome process for obtaining immigration records. Part V proposes that documents concerning the asylum seeker's application be proactively disclosed at the time the applicant is referred to an immigration court and describes two prerequisites to implementation: a shift in approach on the part of the referring agency and an expansion of AO authority so that the AO makes preliminary decisions about disclosure. Part VI concludes with a summary of the need for procedural changes and the benefits of adopting procedures that facilitate a freer exchange of information.

## II. ASYLUM LAW: AN OVERVIEW

### *A. International Roots of American Asylum Law*

American asylum law is based on international agreements that were assembled following World War I and were expanded and solidified following World War II.<sup>36</sup> In response to the hundreds of thousands of war refugees who had not yet been permanently resettled years after

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*formation Act as a Discovery Tool to Fight Unfair Removal Hearings*, 16 CARDOZO J. INT'L & COMP. L. 155, 155 (2008).

35. Proactive disclosure is not only within agency discretion, it is in accord with policy guidelines from the current Administration and from the Department of Homeland Security (DHS). Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51879 (Mar. 19, 2009) [hereinafter Holder Memo], available at <http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>; DEP'T OF HOMELAND SEC., 2013 CHIEF FREEDOM OF INFORMATION ACT OFFICER REPORT TO THE ATTORNEY GENERAL (2013) [hereinafter DHS 2013 CHIEF FOIA OFFICER REPORT], available at [https://www.dhs.gov/sites/default/files/publications/privacy/Reports/Final%20DHS%202013-chief-foia-officer-report-final\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/privacy/Reports/Final%20DHS%202013-chief-foia-officer-report-final_0.pdf).

36. UNITED NATIONS HIGH COMM'N FOR REFUGEES, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 1 (2011) [hereinafter UNHCR 1951 CONVENTION], available at <http://www.unhcr.org/4ec262df9.html>. See also DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 2 (Paul T. Lufkin ed., 1999) (discussing that asylum status, withholding of removal, and refugee status are all based on provisions from the 1951 Convention and the 1967 Protocol ratified by the United States in 1968).

the close of World War II, the international community (through the United Nations) ratified the Convention Relating to the Status of Refugees in 1951 (1951 Convention) and later, the 1967 Protocol.<sup>37</sup>

The 1951 Convention and the 1967 Protocol remain the foundational documents in international asylum law and serve as the basis for American asylum law.<sup>38</sup> They codify the belief that nation-states have a responsibility to protect fundamental human rights: if an alien has a “well-founded fear of being persecuted” in her home country, the Convention and Protocol prohibit returning her to that country.<sup>39</sup> The Convention and Protocol define “refugee,” specify the legal protection and social rights a refugee is entitled to receive, and outline the obligations of a refugee towards a host country.<sup>40</sup> The United States fully recognized the refugee rights established by the international community with the Refugee Act of 1980.<sup>41</sup>

### *B. The Global and Domestic Refugee Population*

While the UN Convention and U.S. asylum law establish the right of individuals to seek asylum, they do not oblige nation-states to accept refugees for resettlement.<sup>42</sup> Because there are many more refugees than host countries are willing to accept, refugees often spend years in limbo, unable to return home but without permanent legal status in another country.<sup>43</sup> Of the 10.4 million refugees worldwide, nearly 7.1 million have been living in temporary exile for five years or more.<sup>44</sup> In 2012, less

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37. UNHCR 1951 CONVENTION, *supra* note 36, at 1.

38. See Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 9 (1981); DANIEL C. MARTIN & JAMES E. YANKAY, U.S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2012 2 (2013), available at [http://www.dhs.gov/sites/default/files/publications/ois\\_rfa\\_fr\\_2012.pdf](http://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2012.pdf) [hereinafter DHS ANNUAL FLOW REPORT].

39. UNHCR 1951 CONVENTION, *supra* note 36, at 3.

40. *Id.* at 4–5.

41. Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 145 (1981).

42. DIV. OF INT'L PROT., UNITED NATIONS HIGH COMM'N FOR REFUGEES, UNHCR RESETTLEMENT HANDBOOK 5 (2011) [hereinafter UNHCR RESETTLEMENT HANDBOOK], available at <http://www.unhcr.org/46f7c0ee2.pdf>.

43. *Id.* at 17.

44. The figure of 10.4 million includes only those refugees who remain in temporary living conditions; it does not include refugees who have been granted permanent residence in another country or have been repatriated. The figure also excludes the 4.8 million Palestinians registered as refugees and living in 60 camps in the Middle East. UNHCR GLOBAL REPORT 2012, FINDING DURABLE SOLUTIONS 3 (2012), available at <http://www.unhcr.org/51b1d61d0.html>. For a more detailed description of refugee and IDP numbers, see UNHCR RESETTLEMENT HANDBOOK, *supra* note 42, at 5.

than 1% of the world's refugees were granted resettlement in a host country.<sup>45</sup>

Domestically, refugees (immigrants who enter the United States with legal status as refugees) and asylum seekers (immigrants who seek refugee status after entering the United States) make up a small percentage of immigrants to the United States.<sup>46</sup> In 2011, the United States granted residency to 31,396 refugees, less than 3% of the total legal immigrants for that year.<sup>47</sup> That same year, approximately 48,000 people applied for asylum and about half of that number were successful in their request;<sup>48</sup> asylees (asylum seekers who have been granted refugee status) thus represented about 2% of legal immigrants in 2011.<sup>49</sup> However, the stakes are high for this small number of asylum seekers. People without legal status who have a legitimate fear of returning to their home country are particularly vulnerable to exploitation, trafficking, and sexual or gender-based violence.<sup>50</sup> In order to gain legal status and a measure of security, these asylum seekers must demonstrate that they meet several conditions of eligibility.

### *C. Conditions of Eligibility*

Asylum is a discretionary grant of lawful permanent residency that may be granted upon a showing that the applicant meets the definition of a refugee and does not face any statutory bars.<sup>51</sup> A refugee located outside of the United States applies for refugee status through the Refugee Admissions Program.<sup>52</sup> A refugee within the United States, called an "asylum seeker," applies for refugee status either affirmatively through

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45. UNHCR RESETTLEMENT HANDBOOK, *supra* note 42, at 17.

46. A refugee applies for and is granted residency from outside the United States; an asylum seeker is already present in the United States when she applies for residency. DEP'T OF STATE, REFUGEE RESETTLEMENT IN THE UNITED STATES FACTSHEET (2013) [hereinafter RESETTLEMENT FACTSHEET], available at <http://www.state.gov/j/prm/releases/factsheets/2013/203578.htm>. See also 8 U.S.C. §§ 1521, 1522 (2014).

47. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 48 (2011) [hereinafter DHS 2011 IMMIGRATION YEARBOOK], available at [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois\\_yb\\_2011.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf) (figure based on 1,062,040 new lawful permanent residents).

48. EOIR 2012 YEAR BOOK, *supra* note 19, at K1.

49. DHS 2011 IMMIGRATION YEARBOOK, *supra* note 47, at 11, 48.

50. See, e.g., UNHCR GLOBAL APPEAL 2012–2013, <http://www.unhcr.org/ga12/index.xml> (last visited Mar. 18, 2015) (discussing the need to protect refugees from gender-based violence, human trafficking, discrimination and xenophobia); UNHCR RESETTLEMENT HANDBOOK, *supra* note 42, at 3, 6 (stating that 48% of refugees are female, 46% are under 18 years of age, and a small but growing number are unaccompanied minors).

51. 8 U.S.C. § 1158(b)(1)(A) (2009).

52. RESETTLEMENT FACTSHEET, *supra* note 46. See also 8 U.S.C. §§ 1521, 1522 (2014).

United States Citizenship and Immigration Services (USCIS) or defensively in immigration court.<sup>53</sup> Whatever the route, persons seeking refugee status have the burden of establishing that they meet a three-part standard.

First, the person must be outside his or her country of nationality or habitual residence.<sup>54</sup> Many local conflicts cause enormous upheaval of populations within a country's own borders. In 2013, for example, the United Nations High Commission for Refugees (UNHCR) estimated that over two million Syrians fled their homes in search of safer areas within Syria.<sup>55</sup> Those displaced from one area of a country to another are known as "Internally Displaced Persons" (IDPs); IDPs are eligible for various types of international aid, but are not eligible for refugee status.<sup>56</sup>

Second, the person must have "a well-founded fear of persecution" on account of a protected status: race, religion, nationality, political opinion, or membership in a particular social group.<sup>57</sup> This second element distinguishes refugees from migrants.<sup>58</sup> A migrant may have pressing reasons to relocate, such as a lack of economic or educational opportunities in her home country, widespread crime, a desire to reunite with family, or the need to escape the aftermath of a natural disaster. In contrast, a refugee has fled her country because of targeted persecution directed towards her because of her race, religion, nationality, political opinion, or social group.

Third, the home country must be unable or unwilling to protect the person from the persecution she fears.<sup>59</sup> Again, this element serves to distinguish refugees from migrants. A migrant continues to enjoy the protection of his or her own government, even while abroad; a refugee has a "well-founded fear" that the government of her home country will not or cannot offer protection from the targeted persecution.<sup>60</sup>

A person who meets the three-part definition may nevertheless be barred from refugee status. The "persecutor bar" prohibits granting asylum to refugees who formerly persecuted others.<sup>61</sup> Various criminal con-

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53. RESETTLEMENT FACTSHEET, *supra* note 46. See also 8 U.S.C. § 1158 (2009); 8 C.F.R. § 1208.2(b) (2009).

54. See 8 U.S.C. § 101(a)(42)(A) (2013).

55. UNHCR RESETTLEMENT HANDBOOK, *supra* note 42, at 5.

56. 8 U.S.C. § 101(a)(42) (2013); UNHCR RESETTLEMENT HANDBOOK, *supra* note 42, at 5.

57. 8 U.S.C. § 101(a)(42)(A) (2013); 8 U.S.C. § 1158(b)(1)(B)(i) (2009).

58. UNHCR 1951 CONVENTION, *supra* note 36, at 3.

59. 8 U.S.C. § 101(a)(42)(A) (2013).

60. UNHCR 1951 CONVENTION, *supra* note 36, at 3.

61. 8 U.S.C. § 1158(b)(2)(A)(I) (2009). The "persecutor bar" is also part of international law. UNITED NATIONS HIGH COMM'N FOR REFUGEES, HANDBOOK AND GUIDELINES ON PROCEDURES



victions also render a person ineligible for asylum.<sup>62</sup> Applicants who have been granted resettlement in one host country may not use refugee status to receive resettlement in another host country.<sup>63</sup> In addition, asylum applicants located in the United States must apply within one year of arriving.<sup>64</sup>

#### *D. The Application Process*

Asylum claims in the United States fall into two categories: defensive and affirmative.<sup>65</sup> Applicants who are in removal proceedings may assert asylum as a defense against removal, while applicants who are not in removal proceedings may assert an affirmative asylum claim.<sup>66</sup>

##### 1. Defensive Asylum Claims

Any person who entered the United States without permission, overstayed legal permission to reside in the United States, or whose legal permission to reside in the United States was revoked due to a criminal conviction is subject to removal.<sup>67</sup> Removal proceedings are initiated when Immigration and Customs Enforcement (ICE)—the law enforcement division of the Department of Homeland Security (DHS)—issues a Notice to Appear in immigration court.<sup>68</sup> A defensive asylum application is an avenue to request relief: the applicant argues that she should not be removed to her home country because she meets the definition of a refugee.<sup>69</sup> The proceeding is an adversarial hearing before an IJ.<sup>70</sup> An ICE trial attorney represents the government interest and the applicant either represents herself or obtains counsel at no expense to the government.<sup>71</sup>

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AND CRITERIA FOR DETERMINING REFUGEE STATUS 24 (1992), available at <http://www.unhcr.org/3d58e13b4.html>.

62. 8 U.S.C. § 1158(b)(2)(A)(ii)–(iv) (2009).

63. 8 U.S.C. § 1158(b)(2)(A)(vi) (2009).

64. 8 U.S.C. § 1158(a)(2)(B) (2009).

65. DHS ANNUAL FLOW REPORT, *supra* note 38, at 4.

66. *Id.*

67. *See* 8 U.S.C. § 1182 (2013); 8 U.S.C. § 1227 (2008). USCIS maintains an excellent explanation of the asylum process on its website, available at <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states>.

68. 8 C.F.R. § 1239.1(a) (2004).

69. Fauziya, referenced in the Introduction, filed a defensive asylum claim. *See In re Kasinga*, 21 I. & N. Dec. 357, 357 (B.I.A. 1996). It is unclear whether Nafissatou, also referenced in the Introduction, filed a defensive or an affirmative claim. *See Dwyer, supra* note 1.

70. 8 U.S.C. § 1229(a)(2006). In the case of expedited removal, the applicant is first screened by an AO for “credible fear.” If the applicant is determined to have credible fear of persecution in her home country, she is referred to an IJ for a hearing. 8 C.F.R. § 208.30(a) (2011).

71. *See* 8 C.F.R. § 1003.16 (2008). The majority of defensive asylum claims are filed by immigrants awaiting removal in immigration detention centers. While the overall rate of representation in

In 2012, 35% of defensive asylum claims were granted, allowing 11,978 persons to successfully defend their removal.<sup>72</sup>

## 2. Affirmative Asylum Claims

In 2012, USCIS granted 72% of affirmative asylum applications, recognizing 17,506 applicants as asylees.<sup>73</sup> Applicants who are physically present in the United States and are not in removal proceedings may assert an affirmative asylum claim.<sup>74</sup> Affirmative asylum applicants include persons in the United States with temporary legal status—usually persons with a visitor, student, or work visa—who fear returning to their home country when their visa expires, as well as persons who are in violation of status but have not yet come to the attention of ICE.<sup>75</sup> As mentioned before, affirmative applications are filed with another division of DHS, the Citizenship and Immigration Service (USCIS).

The requirements are largely the same in the defensive and affirmative asylum application processes. In both cases, the applicant must show that she meets the definition of a refugee, that she is credible, and that she is not barred from obtaining asylum.<sup>76</sup> However, defensive and affirmative claims are adjudicated by different government agencies.<sup>77</sup> Defensive claims are heard directly by a branch of the Department of Justice (the Executive Office for Immigration Review, or EOIR), with the ICE attorney representing DHS opposing the claim.<sup>78</sup> In contrast, affirmative claims are heard first by the Asylum Division of USCIS, a branch

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immigration court is 56%, the rate for detainees is much lower; by some estimates, 80% of detained immigrants represent themselves. See Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 575 (2009) (citing NINA SIULC ET AL., VERA INST. OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM 1 (2008), available at [http://www.vera.org/sites/default/files/resources/downloads/LOP\\_Evaluation\\_May2008\\_final.pdf](http://www.vera.org/sites/default/files/resources/downloads/LOP_Evaluation_May2008_final.pdf)).

72. DHS ANNUAL FLOW REPORT, *supra* note 38, at 5. See also EOIR 2012 YEAR BOOK, *supra* note 19, at A1.

73. DHS ANNUAL FLOW REPORT, *supra* note 38, at 5. See also EOIR 2012 YEAR BOOK, *supra* note 19, at A1.

74. DHS ANNUAL FLOW REPORT, *supra* note 38, at 5.

75. For an excellent explanation of the asylum process, including a chart of who is eligible to apply affirmatively, see *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last updated Mar. 10, 2011).

76. 8 U.S.C. § 1158(a)(1) (2009).

77. See, e.g., *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last updated Mar. 10, 2011).

78. *Id.*

of DHS.<sup>79</sup> When an affirmative asylum claim is filed, it is USCIS that accesses information about the applicant, conducts an interview, and makes a first decision.

(a). *The Reasonable Fear Interview*

As a branch of DHS, USCIS has broad power to locate information that may concern the applicant. When USCIS receives an asylum application, the agency's first step is to add the application to the applicant's "Alien file," commonly referred to as an "A-file."<sup>80</sup> In *Gonzales & Gonzales Bonds & Insurance Agency Inc. v. United States Department of Homeland Security*, DHS provided a nonexclusive list of the documents that may be contained in an A-file such as naturalization certificates; birth and marriage certificates; reports of arrests and investigations; family history; travel history; education history; employment history; criminal history; professional accreditation information; government-issued identification information (i.e., passport, driver's license); arrival/departure information (record number, expiration date, class of admission, etc.); FBI Identification Number; and Fingerprint Identification Number.<sup>81</sup>

The application is assigned to an AO, who reviews the application and other documents in the A-file in preparation for an interview with the applicant.<sup>82</sup> The AO has broad discretion in conducting the interview.<sup>83</sup> The AO is instructed "to elicit all relevant and useful information bearing on the applicant's eligibility for asylum" in order to determine if the applicant is credible, if she meets the definition of a refugee, and if she has any bars to asylum.<sup>84</sup> The applicant is not required to present witnesses or documentary evidence, but may do so if she wishes.<sup>85</sup>

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79. *Id.*

80. See, e.g., Privacy Act; Alien File (A-File) and Central Index System (CIS) Systems of Records, 72 Fed. Reg. 1755-02, 1757 (2007) ("The hardcopy paper A-File . . . contains all the individual's official record material such as: naturalization certificates; . . . applications and petitions for benefits under the immigration and nationality laws; reports of investigations; . . . correspondence; and memoranda on each individual for whom DHS has created a record.").

81. *Gonzales & Gonzales Bonds & Ins. Agency Inc. v. U.S. Dep't of Homeland Sec.*, 913 F. Supp. 2d 865, 869 (N.D. Cal. 2012).

82. AOBTC INTERVIEWING PART I, *supra* note 14, at 11-12.

83. 8 C.F.R. § 208.9(b) (2011). See also ASYLUM DIVISION, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, AFFIRMATIVE ASYLUM PROCEDURES MANUAL (2013) [hereinafter AFFIRMATIVE ASYLUM MANUAL], available at [http://www.uscis.gov/sites/default/files/files/native documents/Asylum\\_Procedures\\_Manual\\_2013.pdf](http://www.uscis.gov/sites/default/files/files/native documents/Asylum_Procedures_Manual_2013.pdf).

84. 8 C.F.R. § 208.9(b) (2011).

85. 8 C.F.R. §§ 208.9(c), (e) (2011).

The AO takes “clearly written and comprehensive notes,” which serve as the only record of the interview.<sup>86</sup> In most cases, the applicant does not see or review the notes.<sup>87</sup> Under USCIS guidelines, interview notes should indicate “that the asylum officer pursued all relevant lines of questioning” and should include information bearing on credibility and eligibility.<sup>88</sup> AO notes should provide an “accurate and objective record of the interview.”<sup>89</sup> The AO should exercise care even in punctuation because “even an exclamation point placed in reaction to a portion of the applicant’s testimony may appear as a judgment on the applicant’s claim.”<sup>90</sup>

Following the interview, the AO performs her own research.<sup>91</sup> She may consult with foreign embassies and verify the genuineness of any documentary evidence submitted.<sup>92</sup> She may rely upon material from the Department of State “or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions.”<sup>93</sup> The AO also considers indicia of credibility such as the internal consistency of the applicant’s story and the consistency of the applicant’s story with external evidence.<sup>94</sup>

*(b). Decisions of the Asylum Officer*

If the AO grants asylum, the applicant has succeeded and the case is at an end. If the AO does not grant asylum, the procedure differs based on the status of the applicant.<sup>95</sup> If the applicant has legal status in the United States—an applicant with a current student visa, for example—

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86. ASYLUM OFFICER BASIC TRAINING COURSE, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, INTERVIEWING PART 2: NOTE-TAKING 3 (2006) [hereinafter AOBTC INTERVIEWING PART 2], available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Interview-Part-2-Notetaking-31aug10.pdf>. See also AFFIRMATIVE ASYLUM MANUAL, *supra* note 83, at 21.

87. If the applicant reveals information that leads the AO to believe that she may face a statutory bar to asylum, the AO switches from standard note-taking format to sworn question and answer format. In that case, the applicant reviews and signs the question and answer notes. AOBTC INTERVIEWING PART 2, *supra* note 86, at 6.

88. *Id.* at 5.

89. *Id.* at 5–6.

90. *Id.* at 6.

91. AFFIRMATIVE ASYLUM MANUAL, *supra* note 83, at 21–22.

92. *Id.*

93. 8 C.F.R. § 208.12(a) (2011).

94. ASYLUM OFFICER BASIC TRAINING COURSE, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ASYLUM ELIGIBILITY PART IV: BURDEN OF PROOF, STANDARDS OF PROOF, AND EVIDENCE 19 (2006), available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Burden-of-Proof-Standards-Proof-Evidence-31aug01.pdf>. See also AFFIRMATIVE ASYLUM MANUAL, *supra* note 83, at 21–22.

95. 8 C.F.R. § 208.14(c) (2011).

the AO issues to the applicant a Notice of Intent to Deny (NOID).<sup>96</sup> The NOID explains in detail the grounds on which the AO intends to deny the application.<sup>97</sup> The applicant has sixteen days to respond to the NOID; she may submit her own written explanation of any inconsistencies or discrepancies noted by the AO, affidavits from experts or people familiar with her claim, or other documentary evidence.<sup>98</sup> For example, if the NOID states that country reports do not corroborate the applicant's story, the applicant may submit affidavits by experts regarding current country conditions.<sup>99</sup>

In contrast, if the applicant does not have legal status, the AO prepares a detailed Assessment to Refer, which contains the same basic information as a NOID.<sup>100</sup> The AO does not, however, issue the Assessment to the applicant.<sup>101</sup> The AO adds the Assessment to Refer to the A-file, and the entire file is transferred to the ICE office and ICE attorney who will oppose the asylum claim in immigration court.<sup>102</sup> The applicant receives only a Notice to Appear in immigration court.<sup>103</sup> The Notice to Appear—also called a Referral Notice—informs the applicant that she must appear at a hearing, and that if her claim is rejected, a removal order will be issued.<sup>104</sup> While regulations require that a referral to immigration court “state the basis for . . . referral [of the application] and include an assessment of the applicant's credibility[.]”<sup>105</sup> in practice, the referral gives only the most general idea of the basis for the AO's decision.<sup>106</sup> One typical referral stated: “Your testimony at the asylum interview was not credible on material points of your claim.”<sup>107</sup>

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96. AFFIRMATIVE ASYLUM MANUAL, *supra* note 83, at 24. *See also* ASYLUM OFFICER BASIC TRAINING COURSE, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DECISION WRITING PART 1: OVERVIEW AND COMPONENTS, FOCUSING OF 1ST THREE COMPONENTS 7–10 (2006) [hereinafter AOBTC WRITING PART 1], available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Decision-Writing-Part-1-Overview-Components-31aug10.pdf>.

97. AOBTC WRITING PART 1, *supra* note 96, at 7–10.

98. AFFIRMATIVE ASYLUM MANUAL, *supra* note 83, at 34–35.

99. *See, e.g.,* *Leia v. Ashcroft*, 393 F.3d 427, 437 (3d Cir. 2005) (noting that outdated country reports may be insufficient to establish current country conditions).

100. AOBTC WRITING PART 1, *supra* note 96, at 12.

101. *Id.*

102. AFFIRMATIVE ASYLUM MANUAL, *supra* note 83, at 28–29.

103. *Id.*

104. *Id.* *See also* AOBTC WRITING PART 1, *supra* note 96, at 11.

105. 8 C.F.R. § 208.19 (2009).

106. *See, e.g.,* *Kaur v. INS*, 237 F.3d 1098, 1099, *opinion amended on denial of reh'g*, 249 F.3d 830 (9th Cir. 2001).

107. *Id.*

The out-of-status applicant is thus referred to immigration court with very little idea of why her claim was not granted and with no idea of what evidence the AO relied upon in reaching the decision. The resulting imbalance of information creates a burden for the applicant, the agency, and the court.

### III. THE ASYLUM SEEKER REFERRED TO IMMIGRATION COURT

The hearing before the IJ is adversarial and appears at first glance much like a hearing in civil or criminal court: the applicant presents her claim for asylum while DHS, represented by an ICE trial attorney, opposes her claim.<sup>108</sup> Upon closer examination, however, the hearing in immigration court is unique in several respects.

#### *A. The Nature of an Asylum Hearing at an Immigration Court*

Unlike the criminal court system, immigration courts do not offer the presumption of innocence<sup>109</sup> or right to counsel,<sup>110</sup> and the asylum seeker has the burden of proving that she is eligible for relief from removal and that she merits a discretionary grant of asylum.<sup>111</sup> Immigration courts are not bound by the rules of evidence and the IJ has broad discretion to admit into the record any evidence that she finds relevant and not fundamentally unfair.<sup>112</sup> Unlike the civil court system, immigration courts have no meaningful right of discovery.<sup>113</sup> To access the Assessment to Refer or any of the other records in the A-file, the applicant must file a FOIA request seeking documents from the very agency that is prosecuting her; even then, documents are frequently withheld.<sup>114</sup>

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108. 8 U.S.C. § 1229(a) (2006).

109. 8 U.S.C. § 1158(b)(1)(B)(i) (2006).

110. 8 C.F.R. § 1003.16(b) (1997).

111. 8 U.S.C. § 1158(b)(1)(B)(i) (2006).

112. See *In re Ponce-Hernandez*, 22 I. & N. Dec. 784 (B.I.A. 1999); see also *Matter of Toro*, 17 I. & N. Dec. 340 (B.I.A. 1980). Hearsay, for example, is frequently admitted. See, e.g., *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823–24 (9th Cir. 2003); *Guerrero-Perez v. INS*, 242 F.3d 727, 729 (7th Cir. 2001); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990).

113. Heeren, *supra* note 31, at 1580–84 (limited discovery provisions have been applied so narrowly and so infrequently that they do not provide equal access to information). For instances of narrow discovery interpretation in immigration proceedings, see *In re Mohammad J.A. Khalifah*, 21 I. & N. Dec. 107, 112 (B.I.A. 1995) (finding no prejudice in the IJ's denial of the respondent's motion to subpoena a witness and for production of documents in possession of other government agencies); *Matter of Duran*, 20 I. & N. Dec. 1, 3 (B.I.A. 1989) (finding that the IJ properly denied the respondent's motion to subpoena government records); *Matter of Escobar*, 16 I. & N. Dec. 52, 53 (B.I.A. 1976) (affirming denial of a motion for discovery).

114. See, e.g., *Martins v. U.S. Citizenship & Immigration Servs.*, 962 F. Supp. 2d 1106, 1115–17 (N.D. Cal. 2013) (detailing documents withheld despite FOIA requests). See also Heeren, *supra*

The judge's role is unique in immigration court. In addition to weighing the parties' competing arguments, the IJ has "an affirmative duty to develop the record."<sup>115</sup> Especially when an immigrant is unrepresented, the IJ must explain proceedings, elicit testimony, and consider all avenues of relief for which an applicant may be eligible, even if the applicant does not raise them.<sup>116</sup> As the Ninth Circuit explained in *Dent v. Holder*:

Because aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts."<sup>117</sup>

Failure to adequately explain proceedings to a pro se respondent, or failure to elicit testimony that could benefit the respondent, may be grounds for remand.<sup>118</sup> The IJ must meet this double burden—both eliciting facts and deciding between competing claims—while under pressure to hear cases quickly in courts that are "severely understaffed."<sup>119</sup>

### *B. The Credibility Determination*

The credibility determination presents obstacles that favor the fraudulent applicant over the genuine asylum seeker, and these obstacles are heightened by the government withholding documents to use as impeachment evidence. The applicant's primary means of meeting her burden of proof is through her own testimony.<sup>120</sup> The applicant has the right to call witnesses and to offer documentary evidence to support her claim or rebut arguments against her.<sup>121</sup> Often, however, the applicant does not have such supporting evidence because "a genuine refugee does not flee

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note 31, at 1589–94 (detailing the challenges of obtaining documents in the A-file via FOIA request).

115. *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102 (8th Cir. 2014).

116. *See, e.g., Jacinto v. INS*, 208 F.3d 725, 727 (9th Cir. 2000) (remanding the case because the applicant did not fully understand her rights at the proceeding and because the IJ did not elicit all relevant testimony).

117. *Dent v. Holder*, 627 F.3d 365, 373–74 (9th Cir. 2010) (quoting *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002)).

118. *See, e.g., id.* (vacating the B.I.A. decision and transferring to District Court); *Jacinto*, 208 F.3d at 727.

119. *Ramji-Nogales et al.*, *supra* note 23, at 383.

120. *See, e.g., Singh-Kaur v. INS*, 183 F.3d 1147, 1149 (9th Cir. 1999) ("An alien must show by credible, direct, and specific evidence an objectively reasonable basis for the claimed fear of persecution.").

121. 8 U.S.C. § 1229(a)(b)(4)(B) (2006).

her native country armed with affidavits, expert witnesses, and extensive documentation.”<sup>122</sup>

The applicant may establish refugee status through her testimony alone if that testimony is credible, persuasive, detailed, and specific.<sup>123</sup> In determining the applicant’s credibility, the court may consider, among other things, the applicant’s “demeanor, candor, or responsiveness,” the “plausibility” of her account, and the consistency among all of the applicant’s oral or written statements “whenever made and whether or not under oath.”<sup>124</sup> Any inconsistency in the applicant’s story may suffice to find her not credible.<sup>125</sup>

To succeed, an applicant must be found credible. It is not easy, however, to distinguish truth from lies.<sup>126</sup> The factors IJs rely upon, especially demeanor and consistency, tend to work against the genuine applicant, specifically in the context of responding to impeachment through undisclosed documents.

### 1. Demeanor

To prevail on an asylum claim, not only must the applicant’s testimony be consistent, detailed, and believable, but her demeanor must also appear appropriate to the events she relates.<sup>127</sup> Applicants have been found not credible based on “hesitant and unresponsive” answers,<sup>128</sup> “answers [that are] very short, very tight, and without a natural flow,”<sup>129</sup> “evasive demeanor,”<sup>130</sup> or simply based on “demeanor” without further

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122. *Abankwah v. INS*, 185 F.3d 18, 26 (2d Cir. 1999).

123. 8 U.S.C. § 1158(b)(1)(B)(ii) (2006).

124. 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).

125. *See Shrestha v. Holder*, 590 F.3d 1034, 1041 (9th Cir. 2010) (explaining that a single inconsistency that goes to the heart of the claim may be grounds for finding the applicant not credible); *see also Malkandi v. Holder*, 576 F.3d 906, 917 (9th Cir. 2008) (quoting the REAL ID Act and explaining that the IJ may rely on any inaccuracy, regardless of whether it goes to the heart of the asylum claim, as a basis for an adverse credibility finding), *amended and superseded*, 544 F.3d 1029 (9th Cir. 2009).

126. *See, e.g., James P. Eyster, Searching for the Key in the Wrong Place: Why “Common Sense” Credibility Rules Consistently Harm Refugees*, 30 B.U. INT’L L.J. 1, 7 (2012) (describing the fallibility of credibility determinations and noting that experts have about a 50% chance of detecting intentional lies); GAO ASYLUM REPORT, *supra* note 15 (stating that a majority of AOs and IJs expressed the need for further training, especially in credibility determinations).

127. 8 U.S.C. § 1158(b)(1)(B)(iii) (2006); *see also Matter of Dass*, 20 I. & N. Dec. 120, 124 (B.I.A. 1989).

128. *Zhi Kai Tian v. Holder*, 471 F. App’x 42, 43 (2d Cir. 2012).

129. *Jian Jiang v. Holder*, 327 F. App’x 275, 276 (2d Cir. 2009).

130. *Daci v. INS*, 303 F. App’x 956, 957 (2d Cir. 2008); *see also Da Lin Zheng v. Holder*, 332 F. App’x 709, 710 (2d Cir. 2009).



explanation.<sup>131</sup> However, cultural norms and past trauma may impede the applicant's ability to testify in a manner that appears direct, specific, and emotionally appropriate.

Demeanor that is appropriate in another culture may not conform to the American preference for directness and forthrightness.<sup>132</sup> Asylum seekers from oppressive regimes may have learned to distrust government officials and may be hesitant or frightened when speaking to authorities.<sup>133</sup> Women in particular may have been taught not to make eye contact and not to reveal private details to strangers.<sup>134</sup> These experiences and cultural norms may cause an applicant to look down, appear nervous and distrustful, sweat excessively, and hesitate during her hearing—all things that could lead an IJ to believe, based on her demeanor, that she is not telling the truth.<sup>135</sup>

Facial expressions are likewise prone to misinterpretation. For example, as one factor in an adverse credibility finding, the Board of Immigration Appeals (B.I.A.) noted that the applicant "smiled" when revealing a past sexual assault at her hearing, an incident she had not previously mentioned.<sup>136</sup> The record revealed, however, that the applicant smiled and revealed the assault at her hearing because the IJ was a woman; she had not mentioned the incident before because her previous interviewers were men.<sup>137</sup>

Past trauma may also impede the applicant's ability to testify in a manner that appears direct, specific, and emotionally appropriate. According to UNHCR, while 1% of the general population suffers from Post-Traumatic Stress Disorder (PTSD), clinical studies of different refugee populations have revealed rates of PTSD ranging from 39%–100%.<sup>138</sup> People who suffer from PTSD may struggle to recall and relate traumatic events in detail.<sup>139</sup> They may appear withdrawn, uninterested,

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131. *Ze Feng Zhu v. Holder*, 418 F. App'x 11, 13 (2d Cir. 2011); *Juntian Zha v. Holder*, 439 F. App'x 628, 629 (9th Cir. 2011).

132. *Settlage*, *supra* note 27, at 94. *See also* Katherine E. Melloy, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 657–61 (2007).

133. Melloy, *supra* note 132, at 657.

134. *Id.*; *see also* *Settlage*, *supra* note 27, at 94.

135. Melloy, *supra* note 132, at 657–58. *See also* *Settlage*, *supra* note 27, at 94.

136. *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052 (9th Cir. 2002).

137. *Id.*

138. DEP'T OF INT'L PROT., UNITED NATIONS HIGH COMM'N FOR REFUGEES, REFUGEE RESETTLEMENT: AN INTERNATIONAL HANDBOOK TO GUIDE RECEPTION AND INTEGRATION 233 (2002) [hereinafter UNHCR RESETTLEMENT GUIDE], available at <http://www.refworld.org/docid/405189284.html>.

139. *Id.*; *see also* Eyster, *supra* note 126, at 40 (explaining that "individuals who have suffered trauma have much less ability to accurately encode, store, and retrieve memories.").

and unresponsive.<sup>140</sup> Symptoms may be particularly acute when dealing with public officials.<sup>141</sup>

Ironically, the fraudulent applicant is better situated to relate a detailed story with appropriate demeanor than the genuine applicant. The applicant with a false claim typically buys a story or pays an unscrupulous agent to invent a convincing story.<sup>142</sup> For example, Nafissatou, mentioned in the Introduction, obtained a cassette tape with a convincing asylum claim.<sup>143</sup> She listened to the tape until she memorized the story and could deliver it with convincing emotion.<sup>144</sup> Unencumbered by real, confusing, and painful memories, she was found credible.<sup>145</sup>

## 2. Impeaching Through Undisclosed Documents

Each factor that disadvantages the genuine applicant in her direct testimony works against her even more when ICE seeks to impeach through undisclosed and unverified documents.<sup>146</sup> The ICE attorney assigned to oppose the asylum claim has access to every document in the A-file and may introduce them without prior disclosure.<sup>147</sup> Notes from the AO interview and the AO's Assessment to Refer are often used to impeach the applicant. In *Martins v. United States Citizenship and Immigration Services*, the court noted that "in many cases, ICE Trial Attorneys . . . compare court testimony or prior written statements to the notes

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140. Melloy, *supra* note 132, at 653. Melloy states that "[l]ack of emotion can be much more detrimental to a woman's credibility than it is to a man's, due to cultural standards of engendered emotion." *Id.* at 654.

141. UNHCR RESETTLEMENT GUIDE, *supra* note 138, at 235.

142. *See, e.g.*, *United States v. Liu*, 239 F.3d 138, 142 (2d Cir. 2000) (unscrupulous immigration agency used three general asylum stories from which applicants chose one); *Pavlov v. Holder*, 697 F.3d 616, 618 (7th Cir. 2012) (detailing evidence of a false application racket); Kirk Semple et al., *Asylum Fraud in Chinatown: An Industry of Lies*, N.Y. TIMES (Feb. 22, 2014), [http://www.nytimes.com/2014/02/23/nyregion/asylum-fraud-in-chinatown-industry-of-lies.html?\\_r=0](http://www.nytimes.com/2014/02/23/nyregion/asylum-fraud-in-chinatown-industry-of-lies.html?_r=0).

143. Dwyer & Wilson, *supra* note 1; *see also Liu*, 239 F.3d at 142 (unscrupulous immigration agency used three general asylum stories and chose one for each applicant); Semple et al., *supra* note 142.

144. Dwyer & Wilson, *supra* note 1.

145. *Id.*; *see also Semple et al.*, *supra* note 141 (detailing use of memorized stories in asylum applications).

146. *See, e.g.*, *Sharma v. Holder*, 457 Fed. App'x 614, 616 (9th Cir. 2011), *amended on denial for reh'g*, 249 F.3d 830 (9th Cir. 2011); *Koulibaly v. Mukasey*, 541 F.3d 613, 618 (6th Cir. 2008); *Martins v. U.S. Citizenship & Immigration Servs.*, 962 F. Supp. 2d 1106, 1112–13 (N.D. Cal. 2013).

147. 8 C.F.R. § 1240.7(a) (2013) (The IJ "may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial."). *See also Martins*, 962 F. Supp. 2d at 1112–13 (explaining the use of undisclosed documents to impeach).

[from the AO interview] in an effort to identify inconsistencies, and . . . try to impeach the applicant's credibility."<sup>148</sup> The fraudulent applicant is more likely to survive impeachment than the genuine applicant for two reasons: first, by telling a consistent, rehearsed story, the fraudulent applicant leaves herself less open to charges of inconsistency; and second, the same factors that can make a genuine applicant appear evasive during her direct testimony—cultural norms, PTSD, and negative experiences with officials—can make it even more difficult for her to respond to a surprise attack on her truthfulness.

The ICE attorney may use the AO's interview notes or Assessment to Refer and argue that the applicant's testimony is not consistent with her statements to the AO.<sup>149</sup> However, years may pass between filing for asylum and the hearing before the IJ,<sup>150</sup> and the passage of time works against the genuine applicant. As time passes, the asylum seeker continues to process the traumatic events in her past; through natural memory processes, some events recede while others come into sharper focus.<sup>151</sup> The applicant may thus emphasize different aspects of her story at the hearing than she did at her AO interview, creating apparent inconsistencies.<sup>152</sup> In one study, a group of refugees who had been granted refugee status before their arrival in the United Kingdom, and whose histories had been verified, were reinterviewed after their arrival.<sup>153</sup> The researchers found that "up to 65% of the details changed between interviews."<sup>154</sup> While a memorized fraudulent story is likely to remain consistent,<sup>155</sup> a genuinely traumatic experience will be told differently over time.<sup>156</sup> Any inconsistency, however, between the testimony at hearing and the notes from the AO interview, which may have occurred years before, can lead to impeachment and an adverse credibility finding.<sup>157</sup>

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148. *Martins*, 962 F. Supp. 2d at 1113.

149. *See, e.g., id.*

150. *See, e.g.,* Settlege, *supra* note 27, at 100 (noting the asylum process often takes years).

151. Eyster, *supra* note 126, at 37.

152. *See, e.g., id.*

153. *Id.* (citing Jane Herlihy, Peter Scragg & Stuart Turner, *Discrepancies in Autobiographical Memories—Implications for the Assessment of Asylum Seekers: A Repeated Interviews Study*, 324 *BMJ* 324–27 (2002)). The same study found that refugees suffering from PTSD had the highest levels of inconsistency. *Id.*

154. *Id.*

155. *See, e.g.,* Schurtman & Lillard, *supra* note 17, at 59–60 (describing an asylum racket in which applicants memorized stock claims).

156. Eyster, *supra* note 126, at 37.

157. *See* 8 U.S.C. § 1158 (b)(1)(B)(iii) (2009) (establishing that any inconsistency, inaccuracy, or falsehood may be the basis for an adverse credibility finding); *see also* *Malkandi v. Holder*, 576 F.3d 906, 917 (9th Cir. 2009) (quoting the REAL ID Act and explaining that the IJ may rely on any

In addition, the AO notes and Assessment are at least one—and often two—steps removed from what the applicant said. The notes record the AO's impression of the applicant's words, often as relayed through an interpreter. Room for error exists both in the interpretation and in the note-taking process.<sup>158</sup> In addition, an applicant speaking through an interpreter rarely uses the same interpreter at the interview and at the hearing; even if the applicant tells exactly the same story to two different interpreters, style and word choices may cause the resulting accounts in English to differ in some details.<sup>159</sup> A multilingual applicant may be provided an interpreter for a language that is not her most fluent.<sup>160</sup> In addition, the AO's choices of what information to include in the notes and what words to use may result in apparent inconsistencies.

Differences in interpretation may also result in apparent inconsistencies. One applicant, for example, testified before the IJ: "They took my husband and they put chains on him, and they searched the house, and they took some documents from the bedroom."<sup>161</sup> The ICE attorney sought to impeach the applicant for inconsistency, relying on the AO's Assessment to Refer, according to which the applicant said: "[The soldiers] came into the living room and spoke to my husband . . . . They took him to the car and drove him away."<sup>162</sup> The applicant explained that she said the same thing both times, she did not see a conflict between the two statements, and the different interpreters may have conveyed her story differently.<sup>163</sup> Although the interpreters were not questioned about the discrepancy, the IJ concluded that the applicant's "inconsistencies and overall vagueness" merited an adverse credibility finding.<sup>164</sup>

Even inconsistencies that result from misunderstanding a question may be grounds for an attack on credibility. One applicant testified at her

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inconsistency, regardless of whether it goes to the heart of the asylum claim, as a basis for an adverse credibility finding).

158. *See, e.g., Koulibaly v. Mukasey*, 541 F.3d 613, 621 (6th Cir. 2008); *Sharma v. Holder*, 457 Fed. App'x 614, 616 (9th Cir. 2011), *amended on denial for reh'g*, 249 F.3d 830 (9th Cir. 2011).

159. *See, e.g., Koulibaly*, 541 F.3d at 622.

160. *See Khattak v. Holder*, 704 F.3d 197, 200 n.3 (1st Cir. 2013) (declining to make an adverse credibility in the case of a Pakistani applicant, who was most comfortable speaking Urdu but had a Pashto interpreter at his AO interview, even though the IJ found the differences between the testimony at hearing and the AO notes "somewhat concerning").

161. *Koulibaly*, 541 F.3d at 621–22.

162. *Id.* at 622.

163. *Id.*

164. *Id.* at 619. On appeal, the Sixth Circuit reversed the adverse credibility finding, holding that the inconsistent statements were not contradictory. *Id.* at 622. The court also found that the IJ improperly relied on the Assessment to Refer, which lacked detail and did not indicate in what language the interview was conducted. *Id.*

hearing that, among other incidents of past harm, Maoists had *threatened* her in 2002.<sup>165</sup> The ICE attorney introduced the notes from the AO interview not previously disclosed to the applicant to impeach her.<sup>166</sup> The notes indicated that in her interview, the applicant said that she suffered a *physical attack* in 2002.<sup>167</sup> The applicant explained the discrepancy by saying that she was “confused” during the AO interview and had not understood the question.<sup>168</sup> The applicant’s explanation was insufficient to counteract the impression of inconsistency; the IJ found her testimony not credible and denied her asylum claim.<sup>169</sup> On appeal, however, the Ninth Circuit pointed out that the AO notes in fact confirmed the applicant’s testimony; along with the applicant’s statement about being attacked, the notes included the AO’s opinion that the applicant had not understood the question.<sup>170</sup> In that case, evidence corroborating the asylum seeker’s claim was present in the very document used to impeach her; however, without access to that document prior to the hearing, the asylum seeker did not have the opportunity to identify the information and use it to rebut the challenge to her credibility.<sup>171</sup>

Detecting and denying fraudulent claims is necessary to preserve the integrity of the asylum system; thus, credibility is an issue of prime concern.<sup>172</sup> However, several aspects of the credibility determination serve to heighten the imbalance of immigration proceedings and disadvantage genuine applicants without any corresponding increase in detecting fraud. The genuine applicant may not testify in a manner that appears convincing and consistent due to cultural norms, natural memory processes, and past trauma. These same traits make it difficult for the genuine applicant to justify herself when presented with an apparent inconsistency. Withholding immigration documents to impeach tests not whether an applicant’s story is true, but how well the applicant responds when under pressure and when taken by surprise from an authority figure.

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165. *Sharma v. Holder*, 457 Fed. App’x 614, 616 (9th Cir. 2011), *amended on denial for reh’g*, 249 F.3d 830 (9th Cir. 2011).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *See, e.g., Schurtman & Lillard, supra* note 17, at 60 (discussing harm to the system caused by fraudulent immigration practitioners).

#### IV. OBTAINING DOCUMENTS VIA FOIA REQUEST: AN INEFFICIENT, BURDENSOME, AND UNFAIR PROCESS

To lessen the imbalance between the applicant and the ICE attorney and decrease the risk of being surprised by undisclosed documents at hearing, the applicant must file a FOIA request with DHS—the agency conducting her prosecution—and request her own immigration records.<sup>173</sup> She may request her entire A-file, including her asylum application, notes from the reasonable fear interview, source material relied upon by the AO, the Assessment to Refer, and any other information she believes DHS holds.<sup>174</sup> The FOIA request is most often met with partial disclosure. In fiscal year 2012, USCIS processed 145,278 FOIA requests.<sup>175</sup> It granted 16,555 requests in full and granted partial disclosure in 86,270 cases.<sup>176</sup> The remaining 42,453 requests were denied.<sup>177</sup> While FOIA is an important tool for government accountability, in the context of asylum hearings, FOIA unnecessarily increases the burden on the applicant and decreases the efficiency of both DHS and the immigration courts.

##### *A. FOIA Disadvantages the Most Vulnerable Applicants*

The most obvious hurdle for pro se applicants is that they may not know that FOIA exists or how to use it to get their much-needed documents. In *Dent v. Holder*, an immigrant in removal proceedings argued that he was a U.S. citizen and could not be removed.<sup>178</sup> He asserted that his adoptive mother was a U.S. citizen and that she had applied for naturalization on his behalf.<sup>179</sup> Although the IJ granted continuances for him to try to locate his adoptive mother's birth certificate—as proof of her

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173. See, e.g., *Martins v. U.S. Citizenship & Immigration Servs.*, 962 F. Supp. 2d 1106, 1113 (N.D. Cal. 2013) (finding that “[f]or asylum seekers and their representatives, a FOIA request for the A-File is often the fastest way—and for many, the only practical way—to secure information from the A-File that is needed to prepare sufficiently in advance of the merits hearing.”).

174. See, e.g., *Abramyan v. U.S. Dep’t of Homeland Sec.*, 6 F. Supp. 3d 57 (D.D.C. 2013).

175. U.S. DEP’T OF HOMELAND SEC., 2012 FREEDOM OF INFORMATION ACT REPORT TO THE ATTORNEY GENERAL 4 (2013) [hereinafter *DHS 2012 FOIA REPORT*], available at <http://www.dhs.gov/sites/default/files/publications/foia/privacy-foia-annual-report-fy-2012-dhs.pdf>. USCIS received 117,787 new FOIA requests in fiscal year 2012 and had 43,568 requests pending at the start of the year. *Id.* at 3. Note that while DHS is composed of eighteen distinct agencies, USCIS processed 70% of DHS’s total FOIA requests (145,278 out of 205,895 total). *Id.*

176. *Id.* at 4.

177. *Id.* Denials were based on several reasons, including: FOIA exemption, no records or records already referred, request withdrawn, improper FOIA request, fee-related, request improperly described records. *Id.*

178. *Dent v. Holder*, 627 F.3d 365, 369–70 (9th Cir. 2010).

179. *Id.*

citizenship—and his own naturalization application, Dent was unable to obtain the documents.<sup>180</sup> Without such evidence, the IJ ordered him removed to Honduras.<sup>181</sup> Unknown to Dent, among the documents in his A-file was the naturalization application filed by his adoptive mother.<sup>182</sup> On his first appeal, Dent “expressly asked for help getting records relating to his mother’s citizenship etc., because he was in jail and his adoptive mother was dead.”<sup>183</sup> However, he did not file a FOIA request, and DHS did not disclose documents to him.<sup>184</sup> On appeal before the Ninth Circuit, DHS argued that absent a proper FOIA request, it had no obligation to disclose documents in its possession.<sup>185</sup>

For those applicants who know that FOIA exists, they have the burden of providing a description of the records they want disclosed.<sup>186</sup> An applicant who submits only a general description may get few or no documents in return, and her request is not likely to be granted if the applicant is not familiar with the terminology used by DHS to describe herself or her records. In *Abramyan v. United States Department of Homeland Security*, an asylum seeker, through her lawyer, filed a FOIA request seeking a “complete copy of the Alien File (A-File) (including: all decision information, all applications, all petitions, all notices, all exhibits, all submissions, all receipts, and any and all documents that consist of the complete and full Alien file from USCIS).”<sup>187</sup> Although the request included the applicant’s full name, her date and place of birth, and the number of a pending visa, it was denied because it lacked the Alien Number, the number assigned by DHS to a noncitizen.<sup>188</sup>

Yet applicants who properly request all of their immigration documents still often receive only partial disclosure. FOIA includes exemptions for nine categories of information that are not subject to disclosure.<sup>189</sup> While agencies are not required to disclose information falling

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180. *Id.*

181. *Id.* at 370.

182. *Id.* at 374.

183. *Id.* at 372.

184. *Id.*

185. *Id.* at 374. The court strongly chastised DHS for withholding the document, vacated the removal order, and transferred the case to district court for a determination of whether Dent was a citizen. *Id.* at 375. At the time of the transfer, Dent had already had a first trial before an IJ, an appeal to the B.I.A., a second trial before an IJ, a second appeal before the B.I.A., and an appeal to the Ninth Circuit. *Id.* at 369.

186. 5 U.S.C. § 552(a)(3)(A)(i) (2009).

187. *Abramyan v. U.S. Dep’t of Homeland Sec.*, 6 F. Supp. 3d 57, 59–60 (D.D.C. 2013).

188. *Id.* at 60. The request was later granted in part after an appeal by the applicant’s lawyer. *Id.*

189. 5 U.S.C. §§ 552 (b)(1)–(9) (2009). The exemptions may be summarized as: (1) classified national defense information; (2) internal agency rules and practices (personnel); (3) information that

within one or more of these categories, the agency must disclose the nonprivileged portion if such information is “reasonably segregable” from the rest of the privileged document.<sup>190</sup> In 2012, USCIS relied on six of the nine FOIA exemptions, and in most cases, the exemption required only a simple redaction of personal information.<sup>191</sup> In *Abramyan*, for example, USCIS relied on exemption (b)(6)—which exempts information involving matters of personal privacy—to redact the name of the interpreter at the applicant’s asylum interview.<sup>192</sup> Other exemptions, however, are asserted to withhold broad categories of information. FOIA exemption (b)(5) exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”<sup>193</sup> USCIS has frequently asserted exemption (b)(5) to withhold both the Assessment to Refer and the AO’s interview notes.<sup>194</sup> Subsequently, failure to disclose the Assessment and AO notes, even after a properly filed FOIA request, is frequently raised as an issue on FOIA appeal and on appeal following the immigration hearing.<sup>195</sup>

### B. The FOIA Process Burdens the Agency

The FOIA process entails a significant burden on the agency. Although by law an agency must respond to a FOIA request within twenty days,<sup>196</sup> USCIS and its predecessor, Immigration and Naturalization Service (INS), have long struggled to meet the statutory time limit.<sup>197</sup> In the 1991 case *Mayock v. Nelson*, the INS argued that although it had failed

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is prohibited from disclosure by another federal law; (4) trade secrets and other confidential business information; (5) inter-agency or intra-agency communications that are protected by legal privileges; (6) information involving matters of personal privacy; (7) records or information compiled for law enforcement (with six subcategories); (8) information relating to the supervision of financial institutions; and (9) geological information on wells. *Id.*

190. 5 U.S.C. § 552(b) (2009).

191. DHS 2012 FOIA REPORT, *supra* note 175, at 6.

192. *Abramyan*, 6 F. Supp. 3d at 61.

193. 5 U.S.C. § 552(b)(5) (2009).

194. *See, e.g., Abramyan*, 6 F. Supp. 3d at 60–62 (withholding both the Assessment and the notes under exemption (b)(5)); *Anguimate v. U.S. Dep’t of Homeland Sec.*, 918 F. Supp. 2d 13, 18 (D.D.C. 2013) (withholding the Assessment under exemption (b)(5)); *but see Martins v. U.S. Citizenship & Immigration Servs.*, 962 F. Supp. 2d 1106, 1122–23 (N.D. Cal. 2013) (finding that the agency had not met its burden of showing that interview notes fell within exemption (b)(5)).

195. *See, e.g., Abramyan*, 6 F. Supp. 3d at 62 (challenging the withholding of the Assessment and the notes under exemption (b)(5)); *Anguimate*, 918 F. Supp. 2d at 19 (challenging the withholding of the Assessment); *Martins*, 962 F. Supp. 2d at 1109 (requesting an injunction to compel the agency to disclose AO notes).

196. 5 U.S.C. § 552(a)(6) (2009).

197. *See, e.g., Mayock v. Nelson*, 938 F.2d 1006, 1008 (9th Cir. 1991).



to timely reply to FOIA requests, the volume of work involved made it impossible to comply with the statute given agency resources.<sup>198</sup> Following the suit, the INS entered into a national settlement agreement under which it agreed to immediately process expedited requests where the failure to do so would impair due process rights by, for example, not disclosing documents until after a removal proceeding.<sup>199</sup> Nevertheless, in 2011, twenty-seven immigration attorneys submitted declarations “attesting to USCIS’s repeated delays of months and in some cases years in responding to aliens’ requests for their registration files.”<sup>200</sup> The court found that not only did the plaintiffs establish that USCIS still had a pattern of delay, “the history of past violations by USCIS and its predecessor agency—going at least as far back as [the plaintiff’s] first lawsuit against INS [in 1991]—demonstrates the persistent character of the violations and supports a finding that the violations are likely to continue.”<sup>201</sup> The court again enjoined the agency to comply with the statute.<sup>202</sup>

In response to the injunction and emphasis from the Obama Administration that agencies improve the timeliness of processing FOIA requests, DHS has increased personnel and expenditures directed to FOIA processing and has made progress in reducing its backlog.<sup>203</sup> However, even with increased resources, delays are common; in 2012, the average processing time across all of DHS was seventy-two days,<sup>204</sup> far in excess of the twenty days mandated by law.<sup>205</sup>

In addition to burdening the applicant and the agency, the FOIA process increases the burden on immigration courts. The IJ must elicit testimony and explore avenues of relief for the applicant while serving as an impartial decisionmaker.<sup>206</sup> The IJ does not have a duty to issue subpoenas for evidence or delay a hearing for an applicant to seek information held by government agencies.<sup>207</sup> While under pressure to deal

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198. *Id.* at 1007–08.

199. *Hajro v. U.S. Citizenship & Immigration Servs.*, 832 F. Supp. 2d 1095, 1100 (N.D. Cal. 2011).

200. *Id.* at 1105.

201. *Id.* at 1108.

202. *Id.* at 1120.

203. For example, USCIS entered fiscal year 2012 with a backlog of 35,780 requests. At the end of fiscal year 2012, it had 10,727 cases backlogged. DHS 2012 FOIA REPORT, *supra* note 175, at 17, 20.

204. DHS 2013 CHIEF FOIA OFFICER REPORT, *supra* note 35, at 19.

205. 5 U.S.C. § 552(a)(6) (2009).

206. *See, e.g.,* Constanza-Martinez v. Holder, 739 F.3d 1100, 1102 (8th Cir. 2014); Jacinto v. INS, 208 F.3d 725, 727–28 (9th Cir. 2000).

207. *See, e.g., In re Mohammad J.A. Khalifah*, 21 I. & N. Dec. 107, 112 (B.I.A. 1995) (finding no right to discovery in immigration proceedings).

efficiently with an enormous caseload,<sup>208</sup> the IJ must frequently decide whether to instruct an applicant about FOIA and whether to continue a hearing while an applicant waits for and possibly challenges FOIA responses.

*C. Policy and Case Law Support Greater and More Efficient Disclosure*

Apart from the burdens on the parties mentioned above, administrative policy, case law, and common sense all support a shift to greater disclosure of immigration documents. On January 21, 2009, President Obama issued a FOIA Memorandum calling for a “presumption of disclosure” and a “spirit of cooperation” in disclosing information.<sup>209</sup> The Attorney General followed up by issuing FOIA Guidelines on March 19, 2009.<sup>210</sup> The Guidelines call on agencies to reexamine their FOIA practices in light of a “fundamental commitment to open government.”<sup>211</sup> The Guidelines make clear that “an agency should not withhold information simply because it may do so legally.”<sup>212</sup> The Attorney General “strongly encourage[s] agencies to make discretionary disclosures of information,” to disclose information proactively, and to improve efficiency in administering FOIA requests.<sup>213</sup>

The Guidelines also announced a shift in Department of Justice policy.<sup>214</sup> Previously, the Department of Justice defended all agency denials of FOIA requests that “had a sound legal basis.”<sup>215</sup> Under the new policy, the Department of Justice defends only those denials where “the agency reasonably foresees” that disclosure would do real harm to one of the interests protected by the statutory exemptions.<sup>216</sup> In other words, it is no longer enough that information may fall into an exempted category; rather, to deny a FOIA request, the agency must have a legitimate reason to believe that the disclosure would cause harm.<sup>217</sup> As the Attorney General summarized, “bureaucratic hurdles have no place” in a transparent government.<sup>218</sup>

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208. Ramji-Nogales et al., *supra* note 23, at 383.

209. Memorandum to the Heads of Executive Parties and Agencies from the President of the United States Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1773.pdf>.

210. Holder Memo, *supra* note 35.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

Additionally, case law is increasingly calling for greater disclosure. While agency withholding of AO notes, Assessments to Refer, and other documents in the A-file has been widely practiced, several recent decisions have either required disclosure or called into question the use of such documents, when not previously disclosed, to impeach. The practice of withholding AO notes under FOIA exemption (b)(5) was successfully challenged in *Martins v. United States Citizenship & Immigration Services*.<sup>219</sup> In *Martins*, the court noted that while DHS once commonly disclosed AO notes in response to a FOIA request, recent practice has been for the agency to withhold the notes<sup>220</sup> under FOIA exemption (b)(5).<sup>221</sup> At the same time, ICE trial attorneys have increasingly relied upon the notes to impeach at hearing.<sup>222</sup> The court gave DHS two weeks to provide a detailed explanation of why the notes fall within the claimed exemption, and held that “if the notes are similar to the examples in the record . . . it is the court’s holding that the notes are not subject to the deliberative process privilege, and the court does not expect them . . . to be withheld on that ground.”<sup>223</sup> In response, in November 2013, USCIS entered into a settlement in which it agreed that AO notes did not fall under the deliberative process exemption.<sup>224</sup> USCIS agreed to instruct “officers, employees, and agents involved in the processing of FOIA requests” that records reflecting information obtained at asylum interviews “shall be produced.”<sup>225</sup> While USCIS retains the right to withhold the notes based on other exemptions, the settlement precludes “the withholding of such documents on the basis that asylum interview notes are generically protected . . . by virtue of their status as asylum interview notes.”<sup>226</sup>

Similarly, in 2005 the Ninth Circuit called into question the use of Assessments to Refer and other documents from the asylum interview to impeach the applicant’s credibility.<sup>227</sup> In *Singh v. Gonzalez*, the IJ found the applicant not credible, based in part on inconsistencies between his

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219. *Martins v. U.S. Citizenship & Immigration Servs.*, 962 F. Supp. 2d 1106, 1130 (N.D. Cal. 2013).

220. *Id.* at 1114–15.

221. *Id.* at 1119.

222. *Id.* at 1115.

223. *Id.* at 1129. The court noted that the detailed explanation, or Vaughn index, is necessary in order for FOIA to function. *Id.*

224. Settlement Agreement and Order of Dismissal at 2, *Martins v. U.S. Citizenship & Immigration Servs.*, No. C-13-00591-LB (N.D. Cal. Nov. 19, 2013), available at <http://www.courthousenews.com/2013/11/21/immsett.pdf>.

225. *Id.*

226. *Id.*

227. *Singh v. Gonzales*, 403 F.3d 1081, 1085 (9th Cir. 2005).

testimony at hearing and his statements to the AO as recorded in the Assessment to Refer.<sup>228</sup> The B.I.A. affirmed.<sup>229</sup> However, on appeal before the Ninth Circuit, the court found that the asylum interview is a “potentially unreliable point of comparison . . . for purposes of a credibility determination.”<sup>230</sup> Although the IJ compared Singh’s testimony with his statements in the Assessment to Refer, there was “no indication from the record that Singh received a copy of the Assessment to Refer . . . at any time before the IJ issued her decision.”<sup>231</sup> The Ninth Circuit identified numerous problems with relying on the Assessment to Refer to impeach: the Assessment did not indicate the language in which the interview was conducted;<sup>232</sup> Singh was “not asked about whether the asylum officer’s report of the interview was accurate,” either at the time of the interview or at the hearing,<sup>233</sup> and the AO did not testify to confirm the contents of his notes or reports.<sup>234</sup> Finally, the court noted that the 1995 amendments to asylum procedures reduced the authority of the AO, and arguably reduced the expectation that the AO keep accurate and reliable records of the asylum interview:

The amendment of the regulations effectively removed the two principal functions—preparing a written assessment of the claim and rendering a written decision—that would require, or at least provide an impetus for, in the majority of asylum interviews, an asylum officer to keep an accurate and reliable record of the applicant’s statements during the interview.<sup>235</sup>

The court found that the Assessment to Refer lacked sufficient indicia of reliability to support the adverse credibility finding and remanded for further proceedings, accepting Singh’s testimony as credible.<sup>236</sup>

The 2009 case *Cinapian v. Holder* focused on the fundamental unfairness of using undisclosed and unverified documents to impeach.<sup>237</sup> In *Cinapian*, an Iranian national applied for asylum based on targeted persecution of Christians in her home country.<sup>238</sup> She filed various support-

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228. *Id.*

229. *Id.* at 1083.

230. *Id.* at 1087.

231. *Id.* at 1086.

232. *Id.* at 1088.

233. *Id.* at 1086.

234. *Id.* at 1088.

235. *Id.* (quoting *In re R-S-J*, 22 I. & N. Dec. 863, 881–82 (B.I.A. 1999)). See 8 C.F.R. § 208.14(c)(1) (2011).

236. *Singh*, 403 F.3d at 1092–93.

237. See *Cinapian v. Holder*, 567 F.3d 1067 (9th Cir. 2009).

238. *Id.* at 1070–71.

ing documents with her asylum application, including her birth certificate and a Christianity Certificate prepared by a church in Iran.<sup>239</sup> Her claim was referred to immigration court.<sup>240</sup> At the hearing, DHS—represented by an ICE attorney—introduced a previously undisclosed forensic report that cast doubt on the authenticity of the birth certificate and the Christianity Certificate.<sup>241</sup> Although the IJ informed DHS that it should have disclosed the forensic report, she refused to grant a continuance and found the applicant not credible.<sup>242</sup>

On appeal, the Ninth Circuit held that relying on the forensic report to undermine credibility was fundamentally unfair.<sup>243</sup> Even assuming that the forensic report had been prepared properly and without bias, “a variety of possible innocuous explanations for a document’s apparent lack of authenticity may exist.”<sup>244</sup> Had the applicant known that the authenticity of the documents was in doubt, she could have obtained further corroborating evidence; similarly, had the forensic examiner testified, the applicant could have cross-examined her regarding her degree of certainty and the number of times she had examined similar documents from Iran.<sup>245</sup> The court held that “the combination of the government’s failure to disclose the DHS forensic reports in advance of the hearing or to make the reports’ author available for cross-examination . . . denied [the applicant] a fair hearing.”<sup>246</sup>

In the *Dent* case, described above, the Ninth Circuit held that in removal proceedings, the applicant has “mandatory access” to his A-file.<sup>247</sup> The court stated that “Congress has provided that to meet his burden of proof in removal proceedings, ‘the alien shall have access’ to his entry document ‘and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien’s admission or presence in the United States.’”<sup>248</sup> Rejecting DHS’s argument that absent a FOIA request it had no obligation to disclose records, the court held that “this mandatory access law entitled Dent to his A-file” regardless of whether he had filed a FOIA request.<sup>249</sup> Despite the court’s clear language, DHS has construed *Dent* to apply only in the Ninth Circuit and

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239. *Id.* at 1071.

240. *Id.*

241. *Id.* at 1071–72.

242. *Id.* at 1072.

243. *Id.* at 1075.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010).

248. *Id.*

249. *Id.*

only to cases in which a person raises a citizenship claim.<sup>250</sup> However, there is good reason to apply the holding in *Dent* to all asylum hearings.

#### V. TOWARDS GREATER TRANSPARENCY IN ASYLUM PROCEEDINGS

Simpler, faster, and fuller disclosure of records in affirmative asylum adjudications would improve the fairness and transparency of the proceedings, increase the reliability of credibility determinations, encourage efficiency, and reduce costs. Unlike substantive immigration reforms that require congressional action, procedural changes to disclosure are not only within the discretion of USCIS, they are necessary to bring agency policy into harmony with the guidelines established by the Obama Administration, the policy established by DHS, and the trend of case law. USCIS should proactively disclose to the applicant much if not all of the information in the A-file, including research materials relied upon by the AO, the AO notes, and the Assessment to Refer. This disclosure would require USCIS to apply a presumption of openness to the contents of the A-file and to empower the AO to make an initial review of the A-file for sensitive information.

##### *A. Proactive Disclosure to Asylum Applicants*

The asylum seeker referred to immigration court has a certain need for her immigration records held by USCIS. In harmony with policy guidelines calling for transparency<sup>251</sup> and case law mandating disclosure,<sup>252</sup> the applicant should not have to request documents that she needs, that must be disclosed to her, and that are within the agency's possession. Rather, copies of these documents should be delivered to her at the same time as the Notice to Appear. The current system requires a FOIA request even for documents that are necessary to the applicant and that do not fall within a FOIA exception. This disadvantages applicants who are unaware of the FOIA process<sup>253</sup> and adds unnecessary costs and delay to both the applicant and the agency. A presumption of proactive disclosure should exist regarding research materials relied upon by the AO, AO interview notes, and the Assessment to Refer.

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250. Heeren, *supra* note 31, at 1587.

251. Holder Memo, *supra* note 35.

252. See e.g., *Dent*, 627 F.3d at 374.

253. See, e.g., *id.* at 373–74; *Abramyan v. U.S. Dep't of Homeland Sec.*, 6 F. Supp. 3d 57, 60 (D.D.C. 2013) (describing DHS withholding of documents when request did not include Alien Number).

## 1. Research Materials Should Be Proactively Disclosed

Research materials, including Department of State country reports, reports from human rights organizations, and other third-party sources, are valuable “extrinsic evidence” that provide context and serve as a plausibility check on the applicant’s story.<sup>254</sup> The AO is encouraged to access such research and may rely on inconsistency between the applicant’s story and extrinsic evidence as a reason for referring the claim to immigration court.<sup>255</sup> Until 1997, applicants had a statutory right to examine and respond to materials relied upon by the AO; under current law, however, the AO is not required to provide, cite, or even name source materials.<sup>256</sup> While the Assessment to Refer often includes citations to common source material, such as a Department of State country report, at times citations are either lacking entirely or are too obscure to enable access to the cited source.<sup>257</sup>

Disclosing the resources relied upon is necessary for the fair and accurate determination of asylum claims. As the Third Circuit noted, “in the troubled areas of the planet from which asylum claims tend to come, the pace of change is rapid—oppressive regimes rise and fall, and conditions improve and worsen . . . .”<sup>258</sup> Source materials may be inaccurate, incomplete, or outdated.<sup>259</sup> Requiring that reliable citations to source materials be included in the Assessment to Refer would aid both the ICE attorney and the applicant. While ICE attorneys have frequently offered the Assessment to Refer as impeachment evidence, courts have become increasingly skeptical of accepting unsupported assertions contained in Assessments. In *Singh*, the court emphasized that evidence presented against an applicant requires substantial “indicia of credibility”; the simple assertion of an AO is not enough.<sup>260</sup> Inconsistencies between the ap-

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254. See, e.g., *Lialko v. Ashcroft*, 111 F. App’x 134, 135 (3d Cir. 2004); AFFIRMATIVE ASYLUM MANUAL, *supra* note 83, at 21–22.

255. AFFIRMATIVE ASYLUM MANUAL, *supra* note 83, at 21–22.

256. See Proposed Rules: Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 14779, 14789 (1994) (proposing to eliminate the provisions requiring an Asylum Officer to provide the applicant with an opportunity to inspect, explain, or rebut the material(s) relied upon to find that the applicant’s claim has not been approved); 59 Fed. Reg. 62284, 62293 (1994) (noting that the change had been finalized).

257. See, e.g., Complaint for Declaratory and Injunctive Relief, *Hemed v. U.S. Dep’t of Homeland Sec.*, No. 1:2013cv00129 (D.D.C. Jan. 31, 2013), *available at* <http://s3.documentcloud.org/documents/564080/dc-1-2013cv00129-complaint.txt> (listing several examples of obscure citations).

258. *Leia v. Ashcroft*, 393 F.3d 427, 437 (3d Cir. 2005) (quoting *Berishaj v. Ashcroft*, 378 F.3d 314, 327 (3d Cir. 2004)).

259. See, e.g., *id.* (noting that the B.I.A. relied on a country report that was four years old).

260. *Singh v. Gonzales*, 403 F.3d 1081, 1089 (9th Cir. 2005).

plicant's story and reported country conditions should be demonstrated by offering the source material as evidence, not through secondhand assertions.

It is not enough, however, to cite research materials in an Assessment that is then withheld from the applicant. Without access to the sources relied upon, the applicant has no opportunity to rebut inaccurate or outdated evidence.<sup>261</sup> For research materials to be meaningful aids in determining the truth of an asylum claim, both sides must have opportunity to examine and rebut the research relied upon. The sources relied upon by the AO should be disclosed to the applicant along with the referral notice.

## 2. AO Notes Should Be Proactively Disclosed

AO notes should also be proactively disclosed. Per USCIS policy, AO notes are an "accurate" and "objective" record of the applicant's asylum interview.<sup>262</sup> The notes do not contain opinions or inferences from the AO,<sup>263</sup> and cannot properly be considered "part of the deliberative process."<sup>264</sup> In most cases, the notes are the only record of the interview.<sup>265</sup> The notes are frequently relied upon as evidence of the contents of the applicant's statement and her demeanor during her AO interview.<sup>266</sup> In most cases, however, the applicant never reviews those notes.<sup>267</sup> The notes may contain errors or misunderstandings that the applicant is powerless to rebut unless she has access to the notes.

The current process of requiring the applicant to file a FOIA request to obtain the interview notes is particularly unnecessary in light of the *Martins* settlement, which established that AO interview notes will no longer be withheld under the deliberative process exemption.<sup>268</sup> Withholding AO notes until a FOIA request is properly filed creates unnecessary expense for the agency, unnecessary delay for the applicant,

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261. See, e.g., Musalo, *supra* note 7, at 378 (petitioning the B.I.A. to reexamine the IJ's adverse credibility finding because the applicant produced, after her hearing, expert evidence to rebut the assertion that her claim was implausible). The denial of asylum was later overturned. See *In re Kasinga*, 21 I. & N. Dec. 357, 358–59 (B.I.A. 1996).

262. AOBTC INTERVIEWING PART 2, *supra* note 86, at 5–6.

263. *Id.*

264. *Abramyan v. U.S. Dep't of Homeland Sec.*, 6 F. Supp. 3d 57, 61 (D.D.C. 2013).

265. See, e.g., *Sharma v. Holder*, 457 Fed. App'x 614, 616 (9th Cir. 2011), *amended on denial for reh'g*, 249 F.3d 830 (9th Cir. 2011).

266. See, e.g., *Martins v. U.S. Citizenship & Immigration Servs.*, 962 F. Supp. 2d 1106, 1113 (N.D. Cal. 2013); *Sharma*, 457 Fed. App'x at 616.

267. See, e.g., *Singh v. Gonzales*, 403 F.3d 1081, 1089 (9th Cir. 2005).

268. Settlement Agreement and Order of Dismissal at 2, *Martins v. USCIS*, No. C-13-00591-LB (N.D. Cal. Nov. 19, 2013), *available at* <http://www.courthousenews.com/2013/11/21/immsett.pdf>.



and disadvantages applicants who are unaware of FOIA. Conversely, disclosing the notes from the AO interview to the applicant with the referral notice would increase fairness, transparency, and efficiency.

### 3. The Assessment to Refer Should Be Proactively Disclosed

Assessments to Refer are generally withheld under FOIA exemption (b)(5), which protects communications originating within a government agency that are “pre-decisional” and “part of the deliberative process.”<sup>269</sup> While there is no question that the government can demonstrate, “as a technical matter,”<sup>270</sup> that Assessments fall within the inter-agency FOIA exemption,<sup>271</sup> disclosure of the Assessment to Refer would lead to a more fair and efficient process without impeding the government’s ability to detect and deny fraudulent asylum claims. Under FOIA Guidelines, information should not be withheld merely because it could legally fit within an exemption, but rather should only be withheld if the agency “reasonably foresees that disclosure would harm” a protected interest.<sup>272</sup> Accordingly, in 2012 DHS instituted a requirement that when recommending that information be withheld, program offices provide a “harm analysis” detailing the harm that could result from disclosure.<sup>273</sup> Thus, Assessments to Refer should not be withheld unless the agency reasonably foresees—and details in an analysis—the harm that could result from disclosure. USCIS has not and cannot meet this burden.

The Assessment to Refer serves the same purpose and contains the same information as the NOID.<sup>274</sup> The only difference between the two documents is the status of the applicant.<sup>275</sup> If the applicant has a current visa, the AO issues the NOID directly to her.<sup>276</sup> If the applicant does not have a current visa, the AO issues the Assessment to Refer to ICE, who assigns a trial attorney to argue for removal.<sup>277</sup>

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269. 5 U.S.C. § 552(b)(5) (2009). *See, e.g.,* *Anguimate v. U.S. Dep’t of Homeland Sec.*, 918 F. Supp. 2d 13, 18–19 (D.D.C. 2013) (affirming the agency’s withholding of the Assessment to Refer under exemption (b)(5)); *Abramyan*, 6 F. Supp. 3d at 63, 66–67 (affirming withholding the Assessment to Refer and the AO interview notes under exemption (b)(5)). *See also* *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8–9 (2001) (explaining the limits of exemption (b)(5)).

270. Holder Memo, *supra* note 35.

271. 5 U.S.C. § 552(b)(5) (2009).

272. Holder Memo, *supra* note 35.

273. DHS 2013 CHIEF FOIA OFFICER REPORT, *supra* note 35, at 10.

274. AOBTC WRITING PART 1, *supra* note 96, at 7–10. *See also supra* Part II.D.2.b.

275. AOBTC WRITING PART 1, *supra* note 96, at 6–7.

276. *Id.* at 7.

277. *Id.* at 5, 7.

Thus, the same information contained in the Assessment to Refer is routinely and proactively disclosed to the in-status applicant in the NOID. Far from harming a protected interest, disclosing the NOID to the asylum applicant results in a fairer and more accurate determination of credibility. According to a USCIS memorandum, “the NOID is designed . . . so that the filer can understand why the evidence submitted has not been persuasive and can have the best chance to overcome the deficiency if possible.”<sup>278</sup> After receiving the NOID, the in-status applicant has sixteen days to respond.<sup>279</sup> She may submit explanations of her own testimony, research materials that support her claim, or affidavits from experts or other witnesses.<sup>280</sup> USCIS has never argued that disclosing the NOID and allowing the applicant the opportunity to respond hinders the government’s ability to make an accurate determination of credibility, nor is there any evidence to support the assertion.

Under both administrative guidelines and DHS policy, USCIS may only withhold the Assessment to Refer if the agency reasonably foresees that disclosure will harm a protected interest and can describe that harm in detail.<sup>281</sup> However, the same information is routinely disclosed to in-status applicants without harm.<sup>282</sup> USCIS cannot justify the blanket withholding of Assessments to Refer except by recourse to legal technicalities, relying on exactly the kind of “bureaucratic hurdles” that have no place in an open government.<sup>283</sup>

The Assessment to Refer should be disclosed to the applicant without need for a FOIA request in the same way that the NOID is disclosed to the in-status applicant. Such proactive disclosure would pose no risk to a protected interest, but would increase the fairness, transparency, and efficiency of asylum proceedings.

### *B. A Presumption of Disclosure*

While most proposals for immigration reform are predicated on new legislation or radical changes to existing procedures, proactive disclosure of routine documents requires only a shift in agency approach. Under the current presumption of nondisclosure, records in an immigrant’s A-file are presumed to be off-limits and are only disclosed, if at

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278. Interoffice Memorandum from William R. Yates, Associate Director of Operations, USCIS (Feb. 16, 2005), [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2005/rfe021605.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/rfe021605.pdf).

279. AFFIRMATIVE ASYLUM MANUAL, *supra* note 83, at 27.

280. *Id.* at 34–35.

281. Holder Memo, *supra* note 35.

282. AFFIRMATIVE ASYLUM MANUAL, *supra* note 83, at 34–35.

283. Holder Memo, *supra* note 35.

all, after a lengthy and bureaucratic request process. This presumption of nondisclosure, however, is counterproductive in at least three ways: it decreases the integrity of the hearing, increases the cost to the agency, and undermines trust in the immigration system.

### 1. Nondisclosure Does Not Lead to More Accurate Hearings

The practice of nondisclosure hinders the IJ's decisionmaking and invites error. Credibility is notoriously difficult to judge.<sup>284</sup> A full and fair credibility determination is based on "substantial evidence" from both parties, not on "speculation" and "conjecture."<sup>285</sup> The current reliance on nondisclosure may make it easier for the ICE attorney to impeach an applicant, but there is no evidence that it leads to more accurate credibility determinations; instead, the practice arguably disadvantages genuine applicants.<sup>286</sup>

In addition, the practice of nondisclosure encourages ICE to take legal shortcuts by relying on unsupported statements and nonauthenticated documents.<sup>287</sup> For example, relying on the AO's notes or assertions in the Assessment to Refer without calling the AO to testify, without corroborating the AO's assertions, and without allowing the applicant to prepare a rebuttal is a legal shortcut that would not be tolerated in criminal court.<sup>288</sup> Such shortcuts may quickly undermine an applicant's credibility, but "shortcuts frequently turn out to be mistakes."<sup>289</sup> The courts "should not encourage the cutting of corners by an agency having such significant responsibilities."<sup>290</sup>

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284. Eyster, *supra* note 126, at 8 (noting that even experts have little more than a 50% success rate at distinguishing truth from lies).

285. Joseph v. Holder, 600 F.3d 1235, 1245 (9th Cir. 2010) (quoting Shah v. INS, 220 F.3d 1062, 1071 (9th Cir. 2000)).

286. See *supra* Part III.B.

287. See, e.g., Martins v. U.S. Citizenship & Immigration Servs., 962 F. Supp. 2d 1106, 1106 (N.D. Cal. 2013); Cinapian v. Holder, 567 F.3d 1067, 1077 (9th Cir. 2009).

288. See, e.g., Singh v. Gonzales, 403 F.3d 1081, 1088 (9th Cir. 2005); FED. R. EVID. 801–802 (defining hearsay and prohibiting its use at trial).

289. Cano-Merida v. INS, 311 F.3d 960, 965 (9th Cir. 2002); see also Cinapian, 567 F.3d at 1076–77 (finding that "[w]hen the government fails to notify Petitioners in advance of the hearing of evidence and also does not take reasonable steps to make the preparer of that evidence available for cross-examination at the hearing, the proper course is for the IJ either to grant a continuance or to refuse to admit the evidence").

290. Urooj v. Holder, 734 F.3d 1075, 1079 (9th Cir. 2013) (quoting Navia–Duran v. INS, 568 F.2d 803, 811 (1st Cir. 1977)).

## 2. Nondisclosure Is Expensive

Not only does nondisclosure inhibit the agency from detecting fraud, it unnecessarily increases agency costs and undermines trust in the immigration system. The presumption of nondisclosure increases agency costs because it routes all documents in the A-file through the FOIA administrator, even the most innocuous documents likely to be disclosed if requested. While some information may need a full review by a FOIA administrator, many routine documents do not pose a “reasonably foreseeable” risk of harm and could be disclosed without a full FOIA review. A presumption of openness would allow for many documents to be proactively disclosed, taking them out of the FOIA backlog entirely and saving agency resources.

Nondisclosure also increases costs and decreases efficiency by opening the door to appeal. Although impeaching through undisclosed documents is a longstanding practice, case law has increasingly held that the documents used to impeach may not themselves be reliable and may need corroborating evidence, such as testimony by the author, if relied upon to attack credibility.<sup>291</sup> In *Singh*, *Cinapian*, *Koulibaly*, and many other cases, nondisclosure led to a lengthy and expensive journey through the administrative system and the courts of appeal.<sup>292</sup>

Nondisclosure is also costly because it undermines confidence in the immigration system. By increasing opacity and heightening the imbalance between the parties, nondisclosure fosters distrust of the legal system.<sup>293</sup> The asylum seeker already has the burden of proving that she meets the definition of a refugee and merits a discretionary grant of asylum. The presumption of nondisclosure creates the additional burden of guessing what information the government may have, requesting it properly, and preparing to rebut documents she has never seen.<sup>294</sup> The

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291. See, e.g., *Joseph v. Holder*, 600 F.3d 1235, 1243 (9th Cir. 2010) (rejecting the use of notes from less formal proceedings to impeach during formal removal proceeding); *Cinapian*, 567 F.3d at 1076–77 (finding error where the IJ admitted DHS forensic reports at hearing without calling the forensic examiner to testify regarding her conclusions); *Koulibaly v. Mukasey*, 541 F.3d 613, 620–21 (6th Cir. 2008); *Singh*, 403 F.3d at 1085.

292. See, e.g., *Cinapian*, 567 F.3d at 1067; *Koulibaly*, 541 F.3d at 613; *Singh*, 403 F.3d at 1081.

293. See, e.g., Schurtman & Lillard, *supra* note 17, at 60 (discussing the consequences of “notario fraud” and noting the perception in some immigrant communities that it is impossible to get justice from the U.S. legal system).

294. See, e.g., *Leia v. Ashcroft*, 393 F.3d 427, 430–32 (3d Cir. 2005) (noting that in arriving at an adverse credibility determination, the IJ relied in part on the applicant’s failure to produce evidence corroborating the authenticity of documents he had previously submitted and in part on inconsistency between the applicant’s testimony and undisclosed country reports).

manifest injustice and imbalance of a system where the government does not “fight fair” creates an incentive to circumvent that system.<sup>295</sup>

### 3. Openness Should Be the Presumption

The Attorney General has urged agencies to adopt a presumption of openness, making “discretionary” and “proactive” disclosures even when not required to do so by law.<sup>296</sup> The current presumption of nondisclosure leads to a reflexive withholding of information that, as described above, is both ineffective and inefficient.

In contrast, a presumption of openness would result in a different attitude toward the information stored in the A-file. While the A-file may contain documents that are genuinely sensitive, in most cases, it contains routine records. A presumption of openness would lead USCIS staff to examine the A-file not with a view to how much can be withheld but with the expectation that most, if not all, of the information will be disclosed. In turn, an expectation of proactive disclosure would bypass the need for a FOIA request for many routine documents. As the court held in *Dent*, the noncitizen in a removal proceeding should have “mandatory access” to her A-file, whether she files a FOIA request or not.<sup>297</sup> “The only practical way to give an alien access [to his A-file] is to furnish him with a copy . . . . We are unable to imagine a good reason for not producing the A-file routinely without a request . . . .”<sup>298</sup>

#### *C. The AO as the First Decisionmaker*

Finally, in order to make proactive disclosure practical, USCIS must empower the AO to be the first decisionmaker. Presuming that the A-file will be disclosed and that not all information requires a full FOIA review before disclosure, the first decisions about the sensitivity of information should be made by the person most familiar with that information: the AO.

Agencies generate vast quantities of records. A FOIA request cannot reasonably be foreseen for the majority of these records; thus, records are archived to be accessible if requested. FOIA administrators have the job of receiving FOIA requests, searching for the requested information, and responding to the request with full disclosure, partial disclosure, or a

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295. Schurtman & Lillard, *supra* note 17, at 60.

296. Holder Memo, *supra* note 35.

297. *Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010).

298. *Id.* at 374–75.

denial.<sup>299</sup> However, in the context of asylum referrals, this procedure is redundant and inefficient. Unlike most agency records, the A-file is almost sure to be requested by an asylum applicant who is referred to immigration court; decisions about disclosure could thus be made before the file is ever stored.

The AO knows the A-file thoroughly; she researches the information in the A-file before interviewing the applicant. The AO takes the interview notes and writes the Assessment to Refer. The AO also deals with multiple asylum applications and sees multiple A-files; she is in the best position to notice if a file contains unusual and sensitive information. Rather than a FOIA administrator who sees a file for the first time when it is requested, the AO is the logical person to make an initial determination if information must be redacted or withheld. An initial FOIA review by the AO would empower the AO to determine which documents can be disclosed as is, redact those documents that contain sensitive information that is easily segregable, and flag those documents that require a more thorough review by a FOIA administrator.

Working cooperatively with non-FOIA staff in order to improve efficiency is specifically encouraged in the FOIA Guidelines,<sup>300</sup> and several agencies have already begun to integrate non-FOIA staff into their processing systems.<sup>301</sup> To effectively implement a preliminary review by the AO, the agency would have to provide training and decrease AO caseloads,<sup>302</sup> such adjustments in workload would allow AOs to handle fewer cases more thoroughly while at the same time significantly increasing the efficiency and decreasing the cost of FOIA administration.

The AO, who makes the initial decision concerning the applicant's eligibility, should also make the initial decision regarding disclosure. The AO should be empowered to give the applicant not only a Notice to Appear in immigration court, but also the documents necessary to prepare for that hearing.

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299. See, e.g., DHS 2013 CHIEF FOIA OFFICER REPORT, *supra* note 35 (describing the work of FOIA administration, the personnel devoted to it, and efforts to improve efficiency).

300. Holder Memo, *supra* note 35.

301. Office of Info. Policy, *OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government*, U.S. DEP'T OF JUSTICE (Apr. 17, 2009), <http://www.justice.gov/oip/blog/foia-post-2009-creating-new-era-open-government>.

302. Settlege, *supra* note 27, at 80 (discussing need to decrease AO caseload to increase accuracy).

## VI. CONCLUSION

Domestic and international law recognize the extreme vulnerability of people who are targets of persecution in their home countries due to their race, religion, political opinion, nationality, or social group. To provide a measure of refuge, asylum law prohibits returning such vulnerable individuals to countries where their life or freedom is threatened.

The number of affirmative asylum cases is relatively small, but the stakes are high for all parties; for the applicant, asylum may be the difference between life and death. The government is bound by law and treaty not to return refugees to countries in which they face a well-founded fear of threat to life or freedom, but it must also detect the false claims that accompany the genuine. AOs and IJs seek to make fair and just determinations while working within time and resource constraints.

The current procedure for disclosure of information in affirmative asylum cases is not only unnecessarily burdensome, it leads to inaccurate determinations of credibility and decreases efficiency in USCIS and immigration court. A presumption of disclosure in asylum hearings is not a substitute for comprehensive immigration reform, but it is a possible and pragmatic step that would increase both fairness and efficiency.